Mr. Luke Russell
Director, Environmental Affairs
Coeur d'Alene Mines Corporation

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The Role of NEPA in the States of Washington, Oregon, Idaho, Montana and Alaska

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INTRODUCTION

On behalf of Coeur d'Alene Mines Corporation I am pleased to present testimony today before this task force formed to examine potential improvements in the National Environmental Policy Act (NEPA).

Coeur d'Alene Mines Corporation, based in Coeur d'Alene Idaho, is the world's largest primary silver producer, as well as a significant, low-cost producer of gold. The Company has mining interests in Idaho, Alaska, and Nevada as well as in Argentina, Australia, Chile and Bolivia. The company has extensive experience with the NEPA process in Idaho, Alaska as well as in Nevada in the permitting and closure of hard rock mining projects.

My experience includes over 22 years working with NEPA in the permitting, reclamation and closure of hard rock mines in the western United States. I have worked in government and in industry and am currently the Environmental Director for the company.

The National Environmental Policy Act was passed at the dawn of our countries environmental awareness. In the late 1950's President Eisenhower created a commission to develop a 10 year plan for America. Of the 15 listed priority items the environment was not one of them. Then came two important publications: Silent Spring and Night Comes to the Cumberland. These were clarion calls for the public consciousness on the environment and for federal agencies to seriously consider environmental effects of its actions. The passing of NEPA created the Council on Environmental Quality (CEQ) and lead to creation of the Environmental Protection Agency along with several environmental legal centers which through litigation helped defined the law we have today. This began a continuum of environmental awareness by our society, American industry, including mining, and the federal regulatory agencies.

The original intent of NEPA was simple and appropriate: Federal agencies must ensure that environmental amenities and values be given appropriate consideration in decision making, along with economic and technical considerations. Federal actions significantly affecting the quality of the human environmental are to include a detailed statement which has became known as the Environmental Impact Statement (EIS), on the environmental impact of the proposed action, any adverse environmental affects, alternatives to the proposed action, relationship between local short-term uses and enhancement of long-term productivity, as well as any irreversible and irretrievable commitments of resources associated with the proposed action. The act was envisioned to supplement existing federal authorities and programs.

The simplicity of the law, however, may have lead to its shortcomings. While the statute includes no judicial review provision the early court decisions set the course that NEPA would not be enforced by the federal agencies charged with considering the environmental affects of its decisions, but by the courts. Thus NEPA is implemented and enforced by costly and time consuming litigation.

NEPA's brief and often vague provisions have provided the courts opportunity to create extensive NEPA "common law". For example, the statute does not specify:

- The definition of a significant impact to the "human environment" which then triggers preparing an EIS,
- The timeline for completing an EIS,
- The scope of an impact statement and level of necessary baseline study,
- The level of analysis in relation to scope of project,
- The range and extent of alternatives an agency must consider,
- When an agency must hold hearings as part of its environmental review process and who may have standing in such hearings,
- Whether agencies may decide not to prepare an EIS. The CEQ has authorized agencies to make a decision that an EIS is not required, but the courts have placed limitations on whether this decision can be made.

The federal courts have thus been left to define and enforce the act. The courts have been influenced by the hard look doctrine, as the purpose of NEPA was to ensure federal agencies consider environmental values in decision making. Agencies today are driven by this fear of appeal or litigation. The result is a longer and more costly process, not necessarily the making of better decisions.

As a part of my job I participate in evaluations of potential mergers and acquisitions of mining projects throughout the world. In considering a new project the first thing I am asked is how long will it take and what will it cost to get it permitted. I can answer this questions will a high degree of confidence in most jurisdictions around the world, with the exception of the United States. When I first began working with NEPA in the mid 1980's the time and cost to prepare an EIS for a mining project took about 18 months and cost about $250,000-$300,000. Today an EIS for a mining project may take 5-8 years and cost $7-8 million or more, before factoring in expected appeals and litigation of the ultimate decision. Thus, it is very difficult to make business decisions in the US under the current permitting environment on federal lands.

CASE HISTORIES

In the mid 1980's Coeur developed the Thunder Mountain Mine in Central Idaho which was located in the cherry stem of the Frank Church River of No Return Wilderness area on private and US Forest Service administered lands. The project was an open pit mine and cyanide heap leach operation. It was located upgradient of Outstanding Resource Waters (ORW) that supported steelhead and salmon fisheries. The company spent

approximately $360,000 in baseline studies for the EIS while the NEPA third-party contractor costs were approximately $160,000. The project was operated and closed successfully.

In comparison, in 1992 a Final EIS and Record of Decision (ROD) were issued for the company's Kensington Project in Alaska, culminating a four-year environmental baseline and EIS analysis. The cost of the engineering and environmental baseline programs involving freshwater quality and fisheries, wildlife, geotechnical, and the marine environment, to mention only a few categories, was approximately $10.8 million with the attendant third-party EIS totaling $1.3 million. The project was not built because gold prices had fallen from nearly $500/oz. to about $380/oz. during this exhaustive NEPA analysis; and one of the cooperating agencies, EPA, took the position that the project as designed would not meet water quality standards.

In 1997 the company retooled the project to address improving the project economics and agencies concerns. Only a Supplemental EIS was determined to be required by the USFS lead agency. However, the cost of this "supplemental" analysis was an additional $4.4 million and $1.6 million more was spent for engineering and environmental studies and the SEIS.

Once again, while the highest engineering and environmental design standards were maintained throughout the process, the price of gold had further declined to about $290/oz. Once again, an optimization program was initiated by Coeur to reduce capital and operating costs, and maintain environmental performance. A second Supplemental EIS was required for the scaled-down project, and in 2004 the Final Supplemental EIS was issued. The cost: approximately $4 million in engineering feasibility studies and a new environmental baseline program, and $1.7 million for the Supplemental EIS.

One reason for this expanding time and escalation in cost to complete NEPA is there are now very few issues an agency is willing to consider insignificant, due to concern about having their decision appealed. NEPA intended agencies to scope a project to identify and eliminate from detailed study the issues which are not significant. Applicants today, however, are required to fund exhaustive study and analysis on almost every issue. We are expected to prove effects are negative and then mitigate for any change in the environment whether or not it would have a significant impact to the environment.

There is nothing in NEPA that requires mitigation for environmental effects. While mitigation is addressed under other federal laws including the Clean Water Act, federal agencies in response to fear of litigation are attempting to require mitigation or compensation under the act for even temporary effects. This is contrary to the originally intent of the law.

NEPA intended to encourage agency cooperation however, this is not mandatory nor is it happening very well. For example at the Beartrack Mine Project near Salmon, Idaho the National Marine Fisheries Services (NMFS) did not engaged in the NEPA process. They also did not engage during the public comment period in the Corps 404 permit process.

Yet, after the close of the NEPA process and a week after the close of the Corps 30 day public notice on the wetland mitigation plan for the project, NMFS provided comments that the ROD be reopened and the 404 permit should be denied. This lead to company, state and federal agencies embarking on a multi year and ½ million dollar effort to address NMFS concerns; Concerns that were ultimately proven to be overstated.

There is increasing emphasis by federal agencies to use consensus based management in the NEPA process. This involves seeking that all potential stakeholders come to agreement on the scope of NEPA analysis and alternatives for consideration. The NEPA process was intended to involve and inform the public, but ultimately the decision must be made by the federal agencies, not by a vote of the participants.

Another reason for escalating time and costs to complete NEPA has been pressure on agencies to require all other permits and approvals be obtained before completing the NEPA process. This presents a catch 22 scenario. This strategy by project opponents only adds to the cost and time to compete NEPA. For example, again from our Kensington mine, the Forest Service's 2004 ROD was appealed on the basis that other permitting processes had not yet been completed. While the Regional Forester denied this appeal it created project and investment uncertainty, caused delay in the processing of other state and federal permits, and added to the cost as the third party contractor that assisted in preparing documents for review by the regional forester. NEPA was not intended to be the master approval of a project but rather ensure environmental effects be given appropriate consideration in the decision making process

NEPA was intended to be a forwarding looking to guide federal decision making through evaluation of environmental impacts, along with economic and technical aspects, of proposed actions. Our Rochester Mine in Nevada has been an operating a surface mine since 1988 and has undergone several NEPA analyses. The mine is fully developed and the area of impact defined by as built drawings. We are nearing the end of the mine's life and have an approved reclamation and closure plan for the project by the state and Bureau of Land Management. Now that the mine is nearing closure we have been required to embark on an EIS for closure. The no-action alternative will be the currently approved reclamation plan for the project. We must question what major federal decision will be made under these circumstances that requires an EIS? Requiring an EIS after a mine is developed and operated, only adds cost and uncertainty to the project.

These examples illustrate the uncertainty, delay and associated escalating costs in the federal permitting process as a result of NEPA. As a consequence many companies, including mining companies, look overseas for their project investments. Figure 1 provides data presented in the recent National Academy of Sciences review of hardrock mining regulation and clearly illustrates the declining trend in the number of plans of operations being filed for mining projects. I am confident these trends are continuing today. For most projects, the time, cost and uncertainty of obtaining approvals is simply too great in the United States and mining investment looks elsewhere. The cumbersome NEPA process is key to this circumstance. What has been lost over the years is the

balanced look as envisioned under NEPA to consider environmental, economic and technical considerations.

A year or so ago former EPA Administrator Whitman stood on the shores of Lake Coeur d'Alene and stated that what was needed in the environmental debate today was progress and less process. Two weeks ago, I sat with the NEPA coordinator on our project in Alaska and was told we were not talking about more or less impact of proposed project changes, but that we were tied to process. Clearly such focus away from better decision making and paralysis by process was not the original intent of NEPA.

RECOMMENDATIONS

How can this task force help improve NEPA?

First, the statute is in need of major overhaul not simply a tune up. Some key areas this task force could evaluate in improving NEPA include:

1) Mandatory timelines. The NEPA process typically begins by the applicant entering into a memorandum of agreement with the lead agency that outlines funding and contractor selection to prepare the EIS. This typically includes a schedule for completing the statement. Yet, neither the schedule nor cost is considered binding by the agencies. There is no enforcement mechanism in NEPA to ensure that project schedules are met and costs to perform the analysis are appropriate to the level of decision to be made. An updated act should include enforceable time limits to complete the NEPA process timely.

2) Local Government Involvement. Local communities, most affected by federal decisions, tend to be disenfranchised from the NEPA process. They find it difficult to become cooperating agencies. The federal agencies may not recognize them as they don't have a land use plan, or they lack the resources to participate. While the BLM has recently initiated a program to reach out to local communities the NEPA statute needs to be amended to formally include local communities and governments in this role.

   The benefits of granting cooperating agency status to local governments include; disclosure of relevant information early in the analytical process, receipt of technical expertise, avoidance of duplication with state, tribal and local procedures, and establishment of a mechanism for addressing intergovernmental issues. Such status would neither enlarge nor diminish the decision making authority for either federal or non-federal entities.

3) Criteria for Standing. For the price of a postage stamp a party can appeal a NEPA decision even if they were not actively involved in the process. The statute should be amended to clarify that parties must be involved throughout the process in order to have standing in an appeal.

4) Cooperating Agencies. The intent of NEPA was to ensure agency coordination in making federal decisions that significantly affect the human environment. In practice, however, some federal agencies are seen as less than cooperating. EPA for instance has had a track record of not providing meaningful comment until very late in the process. This leads to delay and additional cost as the lead agency then tries to address their comments or concerns very late in the game. As discussed previously, the National Marine Fisheries Services also has a track record of weighing in very late in the process to escalate endangered species act issues or concerns. The statute should be modified to clarify that federal agencies with an interest must also be engaged throughout the NEPA process.

5) Applicant Involvement. The current NEPA process minimizes the role of the applicant. The applicant is expected to pay for the third party analysis and has the technical expertise to assist in evaluation of technical and economic aspects of the proposal as well as reasonable alternatives. Yet, the role of applicants is generally minimized due to perceived biases in the evaluation. During the recent supplemental EIS for our Kensington project the US Forest Service took the position that Coeur, as the applicant, could not actively participate in the process, or other "publics" such as the Sierra Club or other NGO's would also need to be afforded a seat at the table. The statute should be amended to clarify that the applicant is to have standing as an integral player in the NEPA evaluation process.

6) NEPA Baseline Data. A plan of operation that will trigger a NEPA analysis typically is prepared using considerable amounts of baseline information on project aspects like climate, geology, hydrology and engineering evaluations used in designing the proposed project. Once NEPA is triggered however, federal agencies tend to minimize this information and then begin anew to obtain baseline environmental and engineering information. This duplication adds to the cost and time required to compete NEPA. The statute should be revised to allow early baseline information to be utilized in the formal NEPA process.

7) Scope of Analysis, NEPA makes no distinction between level of analysis for a new project, an existing project, or a project entering into closure. A 20 acre mine may go through the same rigorous process as a 2000 acre mine. The analysis should be commensurate with federal decision to be made and status of a project. The analysis must consider not only the environment, but cost and technology as well.

8) Litigation Bonds. Under other legal precedents a litigating party may be asked to post a bond for delays in a project in order to avoid frivolous lawsuits. Such a provision does not exist under NEPA. If a party firmly believed it had grounds to challenge a federal decision following NEPA, then it should be reasonable for them to post a bond should their challenge be overturned.

9) Screening Process. NEPA envisioned that the scoping process would identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (Sec. 1506.3). Yet in practice the agencies commit a large amount of time, resources and applicants money, evaluating alternatives and issues raised by agencies or the public that are not significant, simply to try to avoid future litigation. Again at our Kensington project one alternative that was carried throughout the analysis and required exhaustive analysis had an estimated negative 15% return on investment for the company. This analysis obviously did not balance the environmental, economic or technical considerations as required under NEPA. The law needs to be fixed to require the consideration of economic criteria in determining reasonably alternatives for the analysis.

   The accepted regulatory concept of practicability, as taken from the Clean Water Act implementing regulations, should be incorporated into the NEPA regulatory framework. For a project alternative to be considered, it should be required to be supported by feasibility and engineering studies, and be capable of being implemented after taking into account: a) cost, b) existing technology, and c) logistics in light of the overall project purposes to be balanced with relevant environmental considerations.

10) NEPA Ombudsman. One option that may deserve consideration would be to create within CEQ an Ombudsman with decision making authority to resolve conflicts within the NEPA process. This would provide a much needed balance to the pressures put on agencies by environmental law centers, NGO's and by applicants so the original intent of consideration of environment, cost, and technology was being made.

CONCLUSION

The original intent of NEPA was simple and appropriate: Federal agencies must insure that environmental amenities and values be given appropriate consideration in decision making, along with economic and technical considerations. The implementation of the act has been and continues to be bogged down in unnecessary analysis, litigation and escalating costs. The act needs an overhaul to return to its original purpose and some suggestions for doing so have been presented herein. I thank you for the opportunity to comment before this task force today.

FIGURE 1-1 Plans of operations filed with BLM for mining or exploration activities on BLM lands.
Source: BLM, 1992, 1994, 1999b